



November 30, 2001

Ms. Bertha Bailey Whatley
Attorney
Fort Worth Independent School District
100 North University Drive, Suite NW 130
Fort Worth, Texas 76107

OR2001-5571

Dear Ms. Whatley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155508.

The Fort Worth Independent School District (the "district") received a request for the following information.

1. All items in any file kept by the district or any district employee, including any current or former principal or supervisor of Coach McAdams, concerning Coach McAdams' conduct and performance as an employee of the district.
2. A copy of the preliminary and final report by the Office of Special investigations concerning the incident involving coach McAdams and [a named student] on or about February 5, 2001.
3. The transcript, if any, and audiotape of that portion of the school board meeting on June 26, 2001, concerning Coach McAdams' grievance.

You inform us that the district will release the portion of the transcript responsive to request item three above that includes the open session of the meeting. You claim that the remainder of the transcript is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the district does not claim that the rest of the requested information, namely the information responsive to request items one and two above, is excepted from public disclosure, nor do you inform us that you have released this information to the requestor. If the district has not released that information, it must do so promptly, except as noted below. See Gov't Code §§ 552.006, .301(a), .302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. See Gov't Code § 552.352.

Section 552.101 of the Government Code excepts from disclosure information deemed confidential by law. You inform us that the grievance hearing which pertains to this request for information was closed, as authorized by the district Board of Education policy (DGBA (Local)) and section 551.074 of the Government Code. You argue that the portion of transcript of the closed hearing beginning on page 6 is made confidential under the Open Meetings Act (the "OMA"), Chapter 551 of the Government Code.

A governmental body that conducts a closed meeting must keep either a certified agenda or make a tape recording of the proceeding, except for private attorney consultations. Gov't Code §551.103. The agenda or tape is kept as potential evidence in litigation involving an alleged violation of the OMA. See Attorney General Opinion JM-840 (1988). Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (Emphasis added.) Section 551.146 penalizes the unlawful disclosure of a certified agenda or tape recording of a lawfully closed meeting as a Class B misdemeanor, and makes the person responsible for disclosure liable for damages to a person injured or damaged by the disclosure. Thus, such information cannot be released to a member of the public in response to an open records request. See Open Records Decision No. 495 (1988). We therefore conclude that the district must withhold from public disclosure that portion of the submitted transcript which begins on page 6 and ends on page 63 under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

We note that the remaining submitted documents contain information that is confidential by law.¹ The federal Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain

¹The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Thus, FERPA and the accompanying Government Code provisions govern the availability of student or education records held by educational agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. The submitted records contain information that is confidential under FERPA. We have marked this information. (See blue tags).

Section 552.117 may also be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the school district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the school district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The school district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

However, the requestor, as the attorney for the named employee, has a special right of access to the employee's address, telephone number, social security number, and family member information under section 552.023. Section 552.023 of the Government Code grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. Therefore, you may not withhold the employee's address, telephone number, social security number, or family member information in this instance.

We also note that the submitted information contains the named employee's driver's license number. Section 552.130 of the Government Code excepts driver's license numbers from disclosure. However, the requestor has a special right of access to his client's driver's license number under section 552.023 and thus, you may not withhold this information from the requestor.

Finally, we note that the submitted information contains the results of a polygraph examination. Section 1703.306 of the Occupations Code governs the release of polygraph information and provides in pertinent part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occupations Code § 1703.306(a), (b). Although this provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a), in this instance, the requestor has a special right of access to the polygraph information pursuant to section 1703.306(a)(2) of the Occupations Code as he is the individual who requested the polygraph examination. Therefore, the district must release the polygraph examination results to the requestor. We have marked the information to be released. (See green tag).

To summarize, the district must withhold from public disclosure that portion of the submitted transcript which begins on page 6 and ends on page 63 under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. The information we have marked with blue tags must be withheld under FERPA. Information

subject to sections 552.117 and 552.130 must be released in this instance pursuant to section 552.023 of the Government Code. The polygraph examination results must be released to the requestor in this instance under section 1703.306(a)(2) of the Occupations Code. The remaining submitted information must also be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 155508

Enc. Submitted documents

c: Mr. Mark W. Robinett
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(w/o enclosures)